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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,251	12/01/2003	Robert Jason Vickers	P146	1935
27752 7590 06/17/2010 THE PROCTER & GAMBLE COMPANY Global Legal Department - IP Sycamore Building - 4th Floor 299 East Sixth Street CINCINNATI, OH 45202				
EXAMINER				
LAU, JONATHAN S				
ART UNIT		PAPER NUMBER		
1623				
MAIL DATE		DELIVERY MODE		
06/17/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/725,251

**Applicant(s)**

VICKERS ET AL.

**Examiner**

Jonathan S. Lau

**Art Unit**

1623

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 31 March 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-3 and 6-20 is/are pending in the application.
- 4a) Of the above claim(s) 9-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 6-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/GS/US)  
Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

This Office Action is responsive to Applicant's Amendment and Remarks, filed 31 Mar 2010, in which claim 1 is amended to change the scope and breadth of the claim.

This application is a domestic application, filed 01 Dec 2003.

Claims 1-3 and 6-20 are pending in the current application. Claims 9-20, drawn to non-elected inventions, are withdrawn. Claims 1-3 and 6-8 are examined on the merits herein.

The following are modified grounds of rejection necessitated by Applicant's Amendment, filed 31 Mar 2010, in which claim 1 is amended to change the scope and breadth of the claim.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Amended Claims 1-3 and 6-8 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites "wherein the composition further comprises a protein source" (emphasis added). Claims 2-3 and 6-8 depend from claim 1 and incorporate all limitations therein.

The term "protein source" renders the claim indefinite because it is unclear if the % by weight refers to the total mass of the source of protein, including the weight of non-protein components, or if it refers to the protein or crude protein in said source. For example, "meat and bone meal" is approximately 55% by weight crude protein. It is unclear if the "protein source" means the total weight of the meat and bone meal or if the "protein source" means 55% of the weight of the meat and bone meal, or the weight of the crude protein in said meal. For the purpose of facilitating prosecution, the "protein source" has been interpreted as the crude protein, based on written description support for which found at page 5, lines 25-30 of the specification.

**Response to Applicant's Remarks:**

Applicant's Remarks, filed 31 Mar 2010, have been fully considered and not found to be wholly persuasive.

Applicant's Amendment, filed 31 Mar 2010, clearly recites the % as a % by weight.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1 and 6-8 are rejected under 35 U.S.C. 102(a) as being anticipated by Flickinger et al. (J. Anim. Sci., August 2003, 81(8), p2008-2018, provided by Applicant

in IDS mailed 15 Aug 2007). Evidence of inherency is provided by Campbell et al. (J. Agric. Food Chem., 1997, 45, p3076-3082, provided by Applicant in IDS mailed 15 Aug 2007) and NRC Nutrient Requirements of Dogs (NRC Nutrient Requirements of Dogs, 1985, p48-57, cited in PTO-892).

Flickinger et al. discloses a dog food composition comprising 50.05% corn, ground, 15.46% wheat, 14.60% meat and bone meal, 11.30% soybean meal having 47% protein and 3.44% corn gluten meal (page 2009, table 1 at top of left column), implicitly % by weight based on footnotes d and e, and oligofructose (OF) in the form of kibble (page 2009, left column, paragraph 3), or a dry composition with the fiber source of oligofructose additional to the short chain oligofructose present in the wheat grain. Flickinger et al. discloses the dogs were adapted to the diet for 18 days (page 2009, right column, paragraph 1), implying the composition is nutritionally balanced. Flickinger et al. compares said diet to a beef diet (page 2012, left column paragraph 2), implying the meat and bone meal is from beef. Flickinger et al. discloses the 15% wheat grain would contribute about 0.02% dietary short chain fructooligosaccharides (scFOS) (page 2017, left column, paragraph 3).

Campbell et al. provides evidence that short chain fructooligosaccharides from wheat grain contain GF2 1-kestose, GF3 nystose, and GF4 1<sup>F</sup>-beta-fructofuranosylnystose (page 3080, table 5 at top of right column, entry grains > wheat).

NRC Nutrient Requirements of Dogs provides evidence that within the dog food arts corn comprises approximately 10% protein, corn gluten meal comprises approximately 46% or 67% protein (pages 47-48), meat and bone meal comprises

approximately 54% protein (page 52) and soybean meal can have 47% protein (page 54) and wheat grain comprises approximately 16% protein (page 56).

Based on the inherent protein content disclosed by the NRC Nutrient Requirements of Dogs, the composition disclosed by Flickinger et al. contains a net 22% protein from a mixture of beef and vegetable sources. Therefore the composition disclosed by Flickinger et al. inherently meets all limitations of instant claims 1 and 6-8.

**Response to Applicant's Remarks:**

Applicant's Remarks, filed 31 Mar 2010, have been fully considered and not found to be persuasive.

Applicant notes that Flickinger discloses the embodiments in the form of a gelatin capsule supplementing a kibbled diet. However, one of ordinary skill in the art would have immediately envisioned incorporating the composition taught by Flickinger in a dog food or a cat food because Flickinger teaches a dog food composition (page 2009, table 1 at top of left column) and teaches said fructans as a dietary carbohydrate (page 2008, right column, paragraph 1) and for inclusion into canine diets (page 2017, right column, paragraph 2).

Applicant notes that instant claim 1 recites a short chain oligofructose and Flickinger et al. discloses oligofructose, and short chain fructooligosaccharides from wheat grain. However, Campbell et al. provides evidence that the term "short chain fructooligosaccharides" from wheat grain contain GF2 1-kestose, GF3 nystose, and GF4 1<sup>F</sup>-beta-fructofuranosylnystose. The instant claim 1 recites 1-kestose, nystose, and 1<sup>F</sup>-beta-fructofuranosylnystose as short chain oligofructose. Therefore the

evidence supports the interpretation that the term "short chain fructooligosaccharides" from wheat grain disclosed by Flickinger et al. is another name for "short chain oligofructose".

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-3 and 6-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Flickinger et al. (J. Anim. Sci., August 2003, 81(8), p2008-2018, provided by Applicant in IDS mailed 15 Aug 2007). Evidence of inherency is provided by Campbell et al. (J. Agric. Food Chem., 1997, 45, p3076-3082, provided by Applicant in IDS mailed 15 Aug 2007).

Flickinger et al. inherently discloses as above. Flickinger et al. further teaches a embodiment of a dog food composition comprising 37% poultry byproduct meal, 19.6% corn, 19.5% brewer's rice and beet pulp (page 2011, table 2 at top of left column), further comprising 0, 0.5, 1 or 1.5 g scFOS in 250 g of kibbled diet (page 2010, right column, paragraph 4-5), or 0%, 0.2%, 0.4% or 0.6% scFOS in the composition. Flickinger et al. teaches scFOS in the form of NutraFlora (page 2010, right column, paragraph 4). The commercial product Nutraflora is defined in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose (Instant Specification, Page 4, second paragraph).

NRC Nutrient Requirements of Dogs provides evidence that within the dog food arts brewer's rice, a brewer's grain, comprises about 29% protein and fresh, non-meal chicken by-product comprises about 48% protein (page 48), and meat and bone meal comprises approximately 54% protein (page 52). Based on the inherent protein content disclosed by the NRC Nutrient Requirements of Dogs, the further embodiment disclosed by Flickinger et al. contains about net 29.6% protein from a mixture of poultry and vegetable sources.

Flickinger et al. does not specifically teach scFOS in the form of NutraFlora from about 0.01% to 0.19% by weight of the composition (instant claim 2). Flickinger et al. does not specifically teach the composition scFOS in the form of NutraFlora from about 0.05% to 0.19% by weight of the composition (instant claim 3).

Flickinger et al. teaches it is within the level of ordinary skill in the art to reasonably predict a correlation between the amount of scFOS and its effects (page



2014, left and right columns and table 8 at bottom of page and page 2015, table 9 at top of page).

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of Flickinger et al. to vary the amount of scFOS in said dog food composition. One of ordinary skill in the art would be motivated to vary the amount of scFOS in said dog food composition between disclosed embodiments of 0% and 0.2% because Flickinger et al. teaches the determination of the correlation between the amount of scFOS and its effects and because Flickinger et al. suggests 0.02% dietary scFOS provides an effect (page 2017, left column, paragraph 3). One of ordinary skill in the art would have a reasonable expectation of success in varying the amount of scFOS in said dog food composition between disclosed embodiments of 0% and 0.2% because Flickinger et al. teaches it is within the level of ordinary skill in the art to reasonably predict a correlation between the amount of scFOS and its effects.

**Response to Applicant's Remarks:**

Applicant's Remarks, filed 31 Mar 2010, have been fully considered and not found to be persuasive.

Applicant notes that Flickinger discloses the embodiments in the form of a gelatin capsule supplementing a kibbled diet. However, it would have been immediately obvious to one of ordinary skill in the art to incorporate the composition taught by Flickinger in a dog food or a cat food because Flickinger teaches a dog food composition (page 2009, table 1 at top of left column) and teaches said fructans as a

dietary carbohydrate (page 2008, right column, paragraph 1) and for inclusion into canine diets (page 2017, right column, paragraph 2).

Applicant notes that instant claim 1 recites a short chain oligofructose and Flickinger et al. discloses oligofructose, and short chain fructooligosaccharides from wheat grain. However, Campbell et al. provides evidence that the term "short chain fructooligosaccharides" from wheat grain contain GF2 1-kestose, GF3 nystose, and GF4 1<sup>F</sup>-beta-fructofuranosylnystose. The instant claim 1 recites 1-kestose, nystose, and 1<sup>F</sup>-beta-fructofuranosylnystose as short chain oligofructose. Therefore the evidence supports the interpretation that the term "short chain fructooligosaccharides" from wheat grain disclosed by Flickinger et al. is another name for "short chain oligofructose".

### ***Conclusion***

No claim is found to be allowable.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jonathan S. Lau whose telephone number is 571-270-3531. The examiner can normally be reached on Monday - Thursday, 9 am - 4 pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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